IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA, Plaintiffs, v. TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC.; COBB-VANTRESS, INC.; AVIAGEN, INC.; CAL-MAINE FOODS, INC.; CAL-MAINE FARMS, INC.; CARGILL, INC.; CARGILL TURKEY PRODUCTION, LLC; GEORGE'S, INC.; GEORGE'S FARMS, INC.; PETERSON FARMS, INC.; SIMMONS FOODS, INC.; and WILLOW BROOK FOODS, INC., Defendants.	Case No. 05-CV-0329 GKF-SAJ

THE CARGILL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER REGARDING CONDUCT OF 30(B)(6) DEPOSITIONS (INCORPORATING REPLY IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS TO DESIGNATE DEPONENTS UNDER RULE 30(B)(6))

To avoid unnecessary duplication and double filing, Defendants Cargill, Inc. and Cargill Turkey Production, LLC ("the Cargill Defendants") submit the following memorandum (1) responding to Plaintiffs' motion for a protective order with respect to the Cargill Defendants' noticed 30(b)(6) depositions (Docket No. 1309) and (2) replying to Plaintiffs' response to the Cargill Defendants' motion to compel those same depositions (Docket Nos. 1308, 1270 respectively).

SUMMARY

The Cargill Defendants urge the Court to grant their motion to compel, to deny Plaintiffs' motion for protective order, and to order Plaintiffs to designate deponents and deposition dates for the five August 17, 2007 Rule 30(b)(6) deposition notices. Plaintiffs' stated grounds for obstructing the depositions are premature and rest primarily on speculation, both about these depositions and about future, as-yet unseen deposition notices by other Defendants. The Cargill Defendants' deposition notices focus directly on Plaintiffs' own Cargill-specific allegations, and any duplication in possible future depositions is extremely unlikely. In addition, Plaintiffs have made no showing of good cause, offering only assertions of possible inconvenience that they might suffer should a specific sequence of future events occur.

ARGUMENT

Courts agree that "[d]ue to the broad scope of discovery, it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition," and an order preventing a deposition is "a drastic action." Horsewood v. Kids "R" Us, 1998 U.S. Dist. LEXIS 13108, at *15 (D. Kan. Aug. 13, 1998) (quotations omitted), included in Appendix A. Consistent with this, courts normally deny such motions to thwart depositions. E.g., Harris v. Euronet Worldwide, Inc., 2007 U.S. Dist. LEXIS 39247, at *4 (D. Kan. May 29, 2007) (citations omitted), included in Appendix A; Miles v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 51734, at *4 (W.D. Ark. July 17, 2007) (citations omitted), included in Appendix A.

Although Plaintiffs ostensibly concede that they "do not dispute the Cargill Defendants' entitlement to conduct relevant discovery of the State by means of Rule

30(b)(6)" (Pls.' Resp. at 2: Docket No. 1308), Plaintiffs have nevertheless refused to identify any deponents or provide any deposition dates so that the Cargill Defendants can at least begin to exercise this acknowledged right. The Cargill Defendants urge the Court to permit their depositions to go forward as noticed, and to address any objections by Plaintiffs, including any claims of duplicativeness, if such issues actually arise in the future.

I. PLAINTIFFS' CONCERNS ARE PREMATURE AND SPECULATIVE.

As discussed in section II below, the Cargill Defendants do not believe that potential deposition notices by other Defendants are likely to be duplicative of the Cargill-specific information sought in the notices at issue here. At present, however, no one—not the Plaintiffs, not the Cargill Defendants, and not the Court—can possibly know that.

As discussed in the Cargill Defendants' original motion, Plaintiffs' stated worries about duplicative depositions tries to manufacture a dispute that does not exist and in fact may never arise. No other Defendant in the case has served any 30(b)(6) deposition notice on Plaintiffs that is even arguably duplicative of the Cargill Defendants' notices, and Plaintiffs do not claim otherwise. Perhaps the other Defendants are waiting to see the results of the Cargill Defendants' depositions to determine further depositions are necessary; perhaps they are awaiting the completion of Plaintiffs' long-delayed document production; perhaps they have other strategic or tactical reasons of which the Cargill Defendants are unaware. Whatever the reasons, however, Plaintiffs' fears about duplication rest entirely on speculation about what other Defendants *might* do.

Plaintiffs' response to the Cargill Defendants' motion actually *emphasizes* the speculative nature of Plaintiffs' stated grounds for refusing to designate a deponent. Lacking

any actual, present objection, Plaintiffs' supposedly "Factual" background discussion is peppered with unsupported assumptions and speculation, including:

- "it is anticipated that..." (Docket No. 1308 at 2);
- "it is not unreasonable to surmise that..." (id. at 3);
- "this will potentially result in..." (id.);
- "the State could be subjected to..." (id.); and
- "Defendants will inevitably want to ask questions about..." (id. at 3, n.2).

Indeed, Plaintiffs' own submissions effectively concede that their objections are not directed at the Cargill Defendants' deposition notices at all; Plaintiffs acknowledge that the Cargill Defendants have the right to take the depositions. (E.g., id. at 2, 5.) Plaintiffs direct their objections *solely* at theoretical future depositions by other Defendants that have not yet been noticed addressing topics that have not yet been specified.[1]

In sum, Plaintiffs have no current, legitimate, non-speculative ground for refusing to designate deponents and dates for the Cargill Defendants' noticed 30(b)(6) depositions. Plaintiffs' claimed concerns over duplicativeness presently exist only in the air. Inasmuch as the Cargill Defendants' initial depositions cannot possibly duplicate anything that has gone before, the Court should direct the depositions to go forward as noticed. Should Plaintiffs believe that any future deposition notices threaten to duplicate depositions already taken, the Court will have an actual record on which to evaluate that claim.

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[1] The Cargill Defendants seriously doubt that concerns such as Plaintiffs' could ever justify restricting other Defendants' desired future discovery. One party's suggestion that another party might obtain information sought from a noticed deponent through other discovery means is not a sufficient reason to impose an alternative method of discovery instead of the method chosen by the noticing party. See Horsewood, 1998 U.S. Dist. LEXIS 13108, at *23.

II. THE CARGILL DEFENDANTS' 30(B)(6) DEPOSITION NOTICES SEEK DISCOVERY SPECIFICALLY RELATING TO PLAINTIFFS' CLAIMS AGAINST THE CARGILL DEFENDANTS.

Moreover, Plaintiffs' purported grounds for alleging inefficiency and duplicativeness do not bear scrutiny. Plaintiffs try to lump all Defendants they have sued together into a single undifferentiated mass and ignore the substantial differences between them, particularly with respect to discovery. Contrary to Plaintiffs' assertion (offered without explanation or citation), the Cargill Defendants and the other Defendants are not "pursuing a joint defense of the State's claims." (Docket No. 1308 at 1.) In fact, each Defendant is differently situated in a number of material respects, and each Defendant is pursuing a different set of factual and legal defenses to Plaintiffs' claims.[2]

The Defendants in this case certainly have coordinated their efforts and worked together to pursue discovery on issues of common interest, including the internal workings of various state agencies and Plaintiffs' own conduct in polluting the IRW. The Court has commended such common efforts, which increase the efficiency and decrease the burdens of discovery for all parties. As to Plaintiffs' grounds for their individual claims against the specific Defendants, however, each Defendant has pursued its own lines of discovery. The

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[2] The fact that the Cargill Defendants have entered into a Joint Defense Agreement and asserted a related privilege with respect to certain communications does not alter this fact. As Plaintiffs implicitly acknowledged in their briefing in support of their motion to compel production of the Joint Defense Agreement from Defendant Simmons, the joint-defense doctrine recognizes that defendants may have privileged communications on matters of common interest while still maintaining separate privileges and protections in their pursuit of their respective unique defenses. Consistent with this, Plaintiffs themselves asserted that they needed a copy of the actual Agreement in order to determine which communications were privileged and which were not. (See, e.g., Docket No. 1260 at 3.)

Cargill Defendants alone noticed these depositions to inquire into the specific grounds for Plaintiffs' claims against the Cargill Defendants.

Plaintiffs also assert that "the type of conduct that forms the basis of the State's claims is common among Defendants" (Docket No. 1309 ¶ 3), and that the noticed "areas of inquiry address matters that are common to all of the Defendants," (Docket No. 1308 at 5). With all due respect to Plaintiffs and their counsel, these statements represent Plaintiffs' own opinion, or perhaps their wish. Defendants are entitled to test these assertions for themselves. Given the statutory and common law theories Plaintiffs have asserted, it is inconceivable to the Cargill Defendants that the evidence against all Defendants will be exactly the same. As noted in the Cargill Defendants' original motion, Plaintiffs have asserted specific claims under CERCLA, RCRA, common law, nuisance, trespass, and other theories alleging that the Cargill Defendants engaged in specific conduct that caused specific damages. Plaintiffs do not dispute this. Conversely, Plaintiffs have not asserted any "collective" or "aggregate" legal theory that would permit them to impute the conduct of another Defendant, or of all Defendants collectively, to the Cargill Defendants. Plaintiffs likewise do not dispute this. Thus, under the case as Plaintiffs themselves have pleaded it, Plaintiffs' claims against the Cargill Defendants must rely on evidence that ties Plaintiffs' claimed damages to the Cargill Defendants' specific conduct. It is that evidence that the 30(b)(6) notices seek to discover.

Because the Cargill Defendants have different interests than the other Defendants, the deposition discovery they presently pursue is specific to the Cargill Defendants and likely to be of little use to the other Defendants. A prime example of this is the example Plaintiffs themselves cite, the request to produce a witness to testify concerning:

> [T]he constituents are components of poultry litter/poultry waste specifically generated by the Cargill Defendants or their card-tracked growers alleged to have harmed the environment of the IRW.

(Id.) This topic is undeniably unique to the Cargill Defendants as they and their growers raise turkeys, while all other Defendants and growers raise chickens. Plaintiffs' assertion that the Cargill Defendants "are well-aware of the constituents of concern in poultry waste . . . and that they exist in all Defendants' poultry waste" (id.), is simply false. This is Plaintiffs' *assertion*, and the Cargill Defendants are entitled to discover what evidence Plaintiffs have to support it. Even Plaintiffs seem uncertain about whether chicken litter and turkey litter differ in any material respect, having recently served discovery on the Cargill Defendants specifically asking about such differences. (Ex. 1: Pls.' Oct. 3, 2007 Discovery to Cargill Defs.)

To cite another example, the Cargill Defendants' 30(b)(6) notices list as areas of inquiry Plaintiffs' evidence concerning "[t]he relationship between the Cargill Defendants and their contract growers" and "[t]he alleged 'domination and control' [quoting from Plaintiffs' complaint] of the Cargill Defendants of their contract growers." (Docket No. 1270-2.) Again, the areas of inquiry are plainly unique to the Cargill Defendants, and go directly to the factual and legal basis for Plaintiffs' claims that the Cargill Defendants are legally liable for the conduct of these independent contractors.

All the other noticed areas of inquiry are likewise directed expressly at Plaintiffs' claims against the Cargill Defendants. Other than vague assertions, Plaintiffs' response offers no explanation or analysis of how the deposition testimony sought on these subjects will be "common to all Defendants."

III. PLAINTIFFS HAVE MADE NO SHOWING OF GOOD CAUSE FOR A PROTECTIVE ORDER.

The decision to enter a protective order is within this Court's discretion. Fed. R. Civ. P. 26(c); Thomas v. Int'l Bus. Machs., 48 F.3d 478, 482 (10th Cir. 1995). The party seeking a protective order has the burden to demonstrate good cause. E.g., Sentry Ins. v. Shivers, 164 F.R.D. 255, 256 (D. Kan. 1996). To establish such good cause, Plaintiffs "must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" Horsewood, 1998 U.S. Dist. LEXIS 13108, at *7 (quoting Gulf Oil v. Bernard, 452 U.S. 89, 102 n.16 (1981)).

Despite their stated concerns, neither Plaintiffs' response nor their motion for protective order offers any specific facts or evidentiary support showing an undue burden or other unfair prejudice that would result from going forward with the Cargill Defendants' 30(b)(6) depositions. This is not surprising; the inherently speculative nature of Plaintiffs' arguments forecloses their ability to show facts supporting good cause. Because Plaintiffs do not know whether, when, or what other depositions may one day be noticed, Plaintiffs can hardly offer a sworn affidavit or other evidence showing the actual burden that such hypothetical discovery would impose.

Instead of demonstrating any actual good cause, Plaintiffs resort to hyperbole, asserting that the Cargill Defendants' notices constitute "taking deposition discovery of the State's 30(b)(6) designees in the most burdensome, most inefficient, most time consuming, and most costly manner possible" (Docket No. 1308 at 1), the deposition notices are not even a "rational approach" to taking discovery (id. at 7), and that the Cargill Defendants' discovery approach is "nonsensical" (id. at 3). Without a factual showing to support these

extreme allegations, however, Plaintiffs have failed to meet their burden to prove cause for denying the Cargill Defendants their noticed depositions.

IV. THE LOGISTICAL ISSUES RAISED BY PLAINTIFFS SHOULD NOT PREVENT THE NOTICED DEPOSITIONS FROM GOING FORWARD.

Plaintiffs' final argument in defense of their failure to provide 30(b)(6) witnesses rests on objections to the number and (by implication) the length of the noticed depositions. For several reasons, these objections fail to justify Plaintiffs' refusal to designate witnesses and provide deposition dates.

A. Plaintiffs Have Failed to Meet and Confer on This Issue.

As a threshold matter, Plaintiffs have failed to comply with the Court's requirements for bringing this discovery issue before the Court. Local Rule 37.1 states in relevant part:

> With respect to all motions or objections relating to discovery pursuant to Fed. R. Civ. P. 26 through 37 and 45, this Court shall refuse to hear any such motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach an accord.

Here, Plaintiffs' assertion that they "sought to meet-and-confer with Defendants on these issues" (Docket No. 1309 at 2, n.1) is mistaken. Until the present response and motion for protective order (Docket Nos. 1308, 1309), Plaintiffs had not provided the Cargill Defendants with *any* notice of *any* kind that Plaintiffs objected to the number and duration of the noticed depositions noticed as "plainly oppressive, unduly burdensome, and expensive." Despite numerous phone conversations and the exchange of numerous letters concerning Plaintiffs' failure to designate deponents (see Docket No. 1270 & Exs. 1-15), Plaintiffs never mentioned any concern about the number or length of the depositions. Because Plaintiffs have failed to comply with the local meet-and-confer rule, they can neither defend their

refusal to designate nor obtain a protective order based on objections they had not raised with the Cargill Defendants.

B. Plaintiffs' Objections Are Not Well Taken.

Plaintiffs' objections to the number and duration of the noticed depositions, based on a single unpublished decision from another federal district, misapprehend parties' rights and obligations under Rule 30(b)(6). "Rule 30(b)(6) streamlines the discovery process ... [by] plac[ing] the burden of identifying responsive witnesses for a corporation on the corporation." Resolution Trust Corp. v. S. Union Co., 985 F.2d 196, 197 (5th Cir. 1993); see also Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co., __ F.3d__, 2007 U.S. App. LEXIS 19015, at *33 (10th Cir. Aug. 10, 2007) (citing in part same), included in Appendix A. Here, the Cargill Defendants have attempted to use Rule 30(b)(6) to streamline discovery in just this way, but have been met with stiff resistance.

Plaintiffs' refusal to designate deponents rests on a very slim reed. Plaintiffs do not dispute that they are required to fully prepare designees to answer the noticed topics, and do not contend that the topics are irrelevant or improper. (See generally Docket Nos. 1308, 1309.) Instead, Plaintiffs have chosen to withhold the number of intended designees, their names, and dates of availability based solely on an objection to the number and the possible durations of those depositions. Relying exclusively on Canal Barge Co. v. Commonwealth Edison Co., Plaintiffs argue that the five noticed depositions should be limited in time to something less than five days, regardless the number of designees Plaintiffs choose to name. (Doc. No. 1308 at 6-7, citing 2001 WL 817853, 2001 U.S. Dist. LEXIS 10097 (S.D. Ill. July 19, 2001), included in Appendix A. Canal Barge does not so hold, and the Federal Rules impose no such unworkable standard on litigants.

The Canal Barge analysis applies where a party receiving a 30(b)(6) notice designates a single deponent and the requesting party desires more than seven hours of deposition time. In that circumstance, a court may extend the number of deposition hours based on factors including the complexity of the noticed topics and documents involved. Fed. R. Civ. P. 30(d)(2) 2000 advisory committee notes. The one-day-of-seven-hours rule is tied to individuals; as the Canal Barge court explained, "if a corporation designates more than one representative in response to a deposition notice under Rule 30(b)(6), the one day limit applies separately to each designee." 2001 U.S. Dist. LEXIS 10097 at *9-10; accord Fed. R. Civ. P. 30(d)(2) 2000 advisory committee notes.

In Canal Barge, a simple contract dispute, a party issued six 30(b)(6) notices denoting factually similar issues, and the responding party prepared a single witness to testify. Instead of limiting the single witness's deposition to seven hours, the court acknowledged that the noticed issues were sufficiently complex to justify three days (21 hours) of deposition. 2001 U.S. Dist. LEXIS 10097, at *11-12. In essence, the court fashioned a compromise that the parties should have worked out among themselves as soon as the responding entity determined that it could adequately prepare a single designee.

The circumstances of the present motion are entirely different. This is not a simple contract dispute, but a complex, multi-faceted combination of mass tort claims. Contrary to Plaintiffs' implication, the Cargill Defendants had no ulterior motive in noticing five depositions. Recognizing that given the scope and variety of Plaintiffs' factual allegations, no single designated witness would likely be able to address all relevant topics, the Cargill Defendants merely grouped the topics into general subject areas to make designation easier. Plaintiffs acknowledge that the 30(b)(6) notices at issue here cover "a large and varied

number of topics" (Docket. No. 1308 at 2), and do not assert that they would be able to designate a single deponent to address all these issues. On the contrary, Plaintiffs themselves use the plural "designees" to describe their deponents (id. at 1, 3, 5, 6, 7, 8), and note that it is "unlikely" they will identify a single designee (id. at 4). Thus, even if the Canal Barge case stood for a bright-line rule that Plaintiffs urge rather than the compromise position it actually adopted, the court's comments concerning the deposition of a single 30(b)(6) designee have no application here.

C. The Cargill Defendants Are Willing to Cooperate with Plaintiffs to Address Any Logistical Problems with the Depositions.

Plaintiffs are mistaken in suggesting that the Cargill Defendants have "refused to coordinate" and "refused to consider the State's proposal" concerning discovery. (Id. at 1, 2.) In fact, the Cargill Defendants are willing to cooperate fully with Plaintiffs and the other Defendants to make sure these depositions are handled as efficiently as possible, so long as such coordination and consolidation does not prejudice the Cargill Defendants' separate, individual interests. Indeed, Plaintiffs' own discussion of the Cargill Defendants' conduct of the deposition of John Littlefield (id. at 6 & n.3, Docket No. 1308-3), demonstrates just this sort of cooperation among all counsel.

The Cargill Defendants are eager to work out the deposition logistics and reach a fair compromise about the length of time allowed for given Plaintiffs' designees discussing given topics. The noticed topics may well be addressed in less than five days, but that depends largely on how many deponents Plaintiffs can adequately prepare to fully discuss the topics. To date, however, the parties have not negotiated about deposition logistics or scheduling because Plaintiffs have steadfastly refused to discuss any specifics with the Cargill

Defendants, not even how many deponents will be designated. Plaintiffs have thus fallen far short of their burden to show good cause for a protective order.

CONCLUSION

Plaintiffs' refusal to let these depositions go forward is mystifying and suggests a motive beyond a mere concern with convenience. In the experience of the Cargill Defendants and their attorneys, most plaintiffs are eager to show defendants the strongest evidence the plaintiffs have of the defendants' claimed wrongful conduct. Here, in contrast, Plaintiffs are inexplicably unwilling to reveal what should be the most compelling facts in support of their case.

As the Court is aware, Plaintiffs have finally admitted that they have no direct evidence of any kind linking the Cargill Defendants with any release of a hazardous substance under CERCLA or an incident constituting a nuisance (e.g., Docket No. 1272 at 5, 8), and the "circumstantial evidence" Plaintiffs have identified does not suggest any link whatever between any act or omission by the Cargill Defendants and the damages Plaintiffs claim. Given these circumstances, the Cargill Defendants suspect that Plaintiffs' refusal to produce deponents rests on their fear that the depositions will reveal that Plaintiffs have no evidence of any kind of any actionable conduct by the Cargill Defendants. This suspicion may be incorrect, but only the depositions themselves can resolve that question.

The Cargill Defendants urge the Court to grant their motion, to deny Plaintiffs' motion for protective order, and to order Plaintiffs to provide dates and deponents pursuant to the pending deposition notices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of October, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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